

111TH CONGRESS  
1ST SESSION

# H. R. 3740

To amend the Small Business Investment Act of 1958 with respect to small business investment companies, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 7, 2009

Mr. LUETKEMEYER introduced the following bill; which was referred to the Committee on Small Business

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## A BILL

To amend the Small Business Investment Act of 1958 with respect to small business investment companies, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Small Business Invest-  
5       ment Company Modernization Act of 2009”.

6       **SEC. 2. QUALIFIED NONPRIVATE FUNDS.**

7       Section 103(13)(C) of the Small Business Investment  
8       Act of 1958 (15 U.S.C. 662(13)(C)) is amended by strik-  
9       ing “33 percent” and inserting “45 percent”.

1 **SEC. 3. LICENSES FOR EXPERIENCED APPLICANTS.**

2 Section 301 of the Small Business Investment Act  
3 of 1958 (15 U.S.C. 681) is amended by inserting after  
4 subsection (c) the following new subsection:

5 “(d) LICENSES FOR EXPERIENCED APPLICANTS.—

6 “(1) IN GENERAL.—Notwithstanding any other  
7 provision of this section, not later than 60 days after  
8 the initial receipt by the Administrator of any re-  
9 quest (which shall be deemed to be the application)  
10 for a license to operate as a small business invest-  
11 ment company under this Act, the Administrator  
12 shall approve the request and issue such license if  
13 each of the following requirements is satisfied—

14 “(A) At least 50 percent of the principal  
15 managers of the applicant consist of at least  
16 two-thirds of the principal managers of a small  
17 business investment company that has been li-  
18 censed under this Act.

19 “(B) The licensed small business invest-  
20 ment company specified under subparagraph  
21 (A) has operated under such license for at least  
22 3 years prior to the receipt specified in para-  
23 graph (1).

24 “(C) The licensed small business invest-  
25 ment company specified under subparagraph  
26 (a)—

1           “(i) either has invested at least 70  
2           percent of its private capital and drawn at  
3           least 50 percent of its projected leverage at  
4           time of its initial licensure or has invested  
5           and expensed or reserved for investment  
6           and expenses or some combination of both  
7           at least 70 percent of its private capital in  
8           the one-year period prior to the date on  
9           which the application referred to in para-  
10          graph (1) was received by the Adminis-  
11          trator;

12           “(ii) has maintained 6 consecutive  
13          quarters of profitable net investment in-  
14          come; and

15           “(iii) has made at least 3 exits from  
16          investments in small businesses that have  
17          realized profits from those respective in-  
18          vestments.

19           “(D) The applicant submits to the Admin-  
20          istrator, in writing, an application consisting of  
21          all of the following:

22           “(i) A certification, in the form pre-  
23          scribed by the Administrator, that such ap-  
24          plicant satisfies the requirements of this  
25          subsection and that all information con-

1           tained in the application is true and com-  
2           plete.

3           “(ii) A copy of the organization docu-  
4           ments of the applicant.

5           “(iii) A copy of the operating plan of  
6           the applicant demonstrating that at least  
7           50 percent of the amount of the planned  
8           investments of the applicant will be in the  
9           same or substantially similar investment  
10          stage and use the same or substantially  
11          similar type of investment instruments as  
12          the investments of the licensed small busi-  
13          ness investment company specified under  
14          subparagraph (A).

15          “(iv) A certification, in a form pre-  
16          scribed by the Administrator, that the ap-  
17          plicant satisfies the requirements of sub-  
18          sections (a) and (c) of section 302 of this  
19          Act.

20          “(E) The applicant is in good standing as  
21          set forth in paragraph (2).

22          “(F) The applicant pays all fees prescribed  
23          by the Administrator under subsection (e).

24          “(2) GOOD STANDING.—For purposes of this  
25          subsection, an applicant is in good standing if—

1           “(A) the licensed debentured or non-lever-  
2           aged small business investment company speci-  
3           fied under paragraph (1)(A) is actively oper-  
4           ating under this Act on the date of the initial  
5           receipt of the application by the Administrator  
6           to which this subsection applies;

7           “(B) no principal manager of the applicant  
8           has been found liable in a civil action for fraud  
9           if the Administrator makes a reasonable deter-  
10          mination based on evidence in the agency  
11          record that such liability has a material adverse  
12          effect on the ability of the applicant to perform  
13          obligations required by a licensee issued pursu-  
14          ant to this Act; and

15          “(C) no principal manager is under inves-  
16          tigation by a governmental agency or authority  
17          for, is under indictment for, or has been con-  
18          victed of a felony for a violation of Federal or  
19          State securities laws, fraud, or another criminal  
20          violation if such investigation, indictment, or  
21          conviction has a material adverse effect on the  
22          ability of the applicant to perform obligations  
23          under a license issued under this Act.

24          “(3) LIMITATION.—

1           “(A) IN GENERAL.—The Administrator  
2           may remove an application from the approval  
3           process under this subsection if the Adminis-  
4           trator determines based on evidence in the  
5           agency record that the approval of the license  
6           would present an unacceptable risk to the gov-  
7           ernment of United States.

8           “(B) IN WRITING.—Such determination  
9           shall be made in writing and provided to the  
10          applicant no later than 10 calendar days after  
11          such determination is made. Failure to provide  
12          the applicant shall be deemed to be a perma-  
13          nent waiver of the Administrator’s authority to  
14          remove an application pursuant to this sub-  
15          section.

16          “(C) NON-DELEGABILITY.—The Adminis-  
17          trator may rely on agency personnel to collect  
18          data or other material relevant to establishing  
19          a record, but the decision to remove the appli-  
20          cation may not be delegated by the Adminis-  
21          trator to any subordinate personnel in the agen-  
22          cy.

23          “(4) NOTICE AND OPPORTUNITY TO CURE NON-  
24          CONFORMANCE.—

1 “(A) NOTICE OF NON-CONFORMANCE.—

2 Except for a determination made pursuant to  
3 paragraph (3), the Administrator shall provide  
4 an applicant described in paragraph (1) within  
5 30 days after receipt of the application a writ-  
6 ten notice and description of any nonconform-  
7 ance with any requirement of this subsection  
8 based on evidence in the agency record.

9 “(B) OPPORTUNITY TO CURE.—The appli-  
10 cant shall have 30 days following the receipt of  
11 nonconformance or the receipt of removal as set  
12 forth in paragraph (3) to cure such non-  
13 conformance.

14 “(C) FAILURE TO PROVIDE NOTICE.—Fail-  
15 ure to provide the notice within the limit set  
16 forth in subparagraph (A) shall be deemed to  
17 be acceptance by the Administrator of the ap-  
18 plicant’s conformance with the requirements of  
19 this subsection.

20 “(5) BACKGROUND REVIEWS.—The Adminis-  
21 trator shall ensure that a timely background check  
22 of the principal managers of each applicant is com-  
23 pleted with respect to paragraphs (2)(B) and (2)(C).

24 “(6) FEES.—The Administrator may charge an  
25 applicant additional fees for carrying out the back-

1 ground reviews mandated by paragraph (5). Such  
2 fees shall be limited to the cost of the review up to  
3 a limit of \$10,000.

4 “(7) EFFECT OF NON-QUALIFICATION.—The  
5 failure of an applicant to qualify for expedited licen-  
6 sure under this subsection shall have no effect on an  
7 existing license or the ability for the applicant or  
8 any of its individual managers to apply for or receive  
9 a license to operate a small business investment  
10 company under the procedures established elsewhere  
11 in this Act.

12 “(8) REGULATIONS.—The Administrator shall  
13 develop forms and promulgate regulations to imple-  
14 ment this subsection after providing an opportunity  
15 for notice and comment. Regulations promulgated  
16 pursuant to this paragraph shall be published in the  
17 Code of Federal Regulations.”.

18 **SEC. 4. MAXIMUM LEVERAGE.**

19 (a) MAXIMUM LEVERAGE.—Section 303(b)(2) of the  
20 Small Business Investment Act of 1958 (15 U.S.C.  
21 683(b)(2)) is amended by striking so much of paragraph  
22 (2) as precedes subparagraph (C) and inserting the fol-  
23 lowing:

24 “(2) MAXIMUM LEVERAGE.—



1           “(A) IN GENERAL.—(i) The maximum  
2           amount of outstanding leverage made available  
3           to any one company licensed under section  
4           301(c) of this Act may not exceed the lesser  
5           of—

6                       “(I) 300 percent of such com-  
7                       pany’s private capital; or

8                       “(II) \$150,000,000.

9           “(ii) In applying clause (i)(I) in the case of  
10          a debenture licensee who is in good standing  
11          without the imposition of additional regulatory  
12          standards whose financings are comprised of at  
13          least 50 percent of loans and debt securities,  
14          such licensee may be leveraged as follows:

15                      “(I) the first one-third of private cap-  
16                      ital to 300 percent;

17                      “(II) the second one-third of private  
18                      capital to 200 percent; and

19                      “(III) the last third of private capital  
20                      to 100 percent.

21          “(iii) Notwithstanding clause (i), in the  
22          case of any company operating as a business  
23          development company (as such term is defined  
24          under section (2)(a)(48) of the Investment  
25          Company Act of 1940) or a majority-owned

1 subsidiary of such a company that is in good  
2 standing without the imposition of additional  
3 regulatory requirements, the maximum amount  
4 of outstanding leverage made available to such  
5 company shall be \$250,000,000.

6 “(B) MULTIPLE LICENSEES UNDER COM-  
7 MON CONTROL.—The maximum amount of out-  
8 standing leverage made available to two or more  
9 companies licensed under section 301(c) of this  
10 Act that are commonly controlled (as deter-  
11 mined by the Administrator) and not under  
12 capital impairment may not exceed  
13 \$350,000,000.”.

14 (b) REGULATIONS.—Section 303(b)(2) of the Small  
15 Business Investment Act of 1958 (15 U.S.C. 683(b)(2))  
16 is amended by adding a new subparagraph (E) at the end  
17 to read as follows:

18 “(E) REGULATIONS.—The Administrator  
19 shall promulgate regulations, after notice and  
20 opportunity for comment, establishing quantifi-  
21 able objective criteria under which a licensee’s  
22 private capital in its entirety may be leveraged  
23 up to 300 percent. Such regulations shall be  
24 published in the Code of Federal Regulations.”.

1       (c) INVESTMENTS IN LOW-INCOME GEOGRAPHIC  
2 AREAS.—Section 303(b)(2)(C) of the Small Business In-  
3 vestment Act of 1958 (15 U.S.C. 683(b)(2)(C)) is amend-  
4 ed by striking “\$250,000,000” in clause (ii)(II) and in-  
5 serting “\$400,000,000”.

6 **SEC. 5. LONG-TERM LOANS TO SMALL BUSINESS CON-**  
7 **CERNS.**

8       (a) MAXIMUM RATE OF INTEREST.—Section 305(c)  
9 of the Small Business Investment Act of 1958 (15 U.S.C.  
10 685(c)) is amended by adding the following at the end  
11 thereof:

12       “In addition to the foregoing, with respect to a loan  
13 made, or debt with equity features acquired, under this  
14 section, a company may not charge an interest rate that  
15 exceeds the yield of 10-year Treasury note plus 16 per-  
16 centage points per annum on the date of initiating the  
17 loan or debt security except that a company may charge  
18 up to an additional 7 percent more than the interest rate  
19 set forth in the loan or debt security in the event of a  
20 default. For purposes of this subsection a default means  
21 the occurrence of any of the following:

22               “(1) Failure to pay an amount when due.

23               “(2) Failure to provide information required  
24       under the applicable financing documents.

1           “(3) Failure to observe any material term, cov-  
 2           enant, or other agreement contained in the applica-  
 3           ble financing documents.

4           “(4) A representation, warranty, certification,  
 5           or statement of fact made by or on behalf of a bor-  
 6           rower in any applicable financing document or in  
 7           any document delivered in connection therewith, that  
 8           was materially incorrect or misleading when made.

9           “(5) Any material event of default specified in  
 10          the applicable financing documents.”.

11 **SEC. 6. SMALL BUSINESS CONCERNS OWNED AND CON-**  
 12 **TROLLED BY VETERANS.**

13          Section 303(b)(2)(C) of the Small Business Invest-  
 14          ment Act of 1958 (15 U.S.C. 683(b)(2)(C)) is amended  
 15          as follows:

16               (1) In the heading, by inserting after “AREAS”  
 17               the following: “AND VETERANS”.

18               (2) In clause (i), by inserting after “351)” the  
 19               following: “or in a small business concern owned and  
 20               controlled veterans (as such term is defined in sec-  
 21               tion 3(q)(3) of the Small Business Act)”.

22               (3) In clause (iii), by inserting after “351)” the  
 23               following: “or in small business concerns owned and  
 24               controlled by veterans (as such is defined in section  
 25               3(q)(3) of the Small Business Act)”.

1 **SEC. 7. ADDITIONAL AUTHORITY.**

2 Section 305 of the Small Business Investment Act  
3 of 1958 (15 U.S.C. 685) is amended by adding at the end  
4 of the following:

5 “(g) A company may require a small business concern  
6 to accept reasonable and customary minimum prepayment  
7 amounts and notices of prepayment.”.

8 **SEC. 8. INVESTMENT IN CERTAIN PASSIVE ENTITIES.**

9 Part A of title III of the Small Business Investment  
10 Act of 1958 (15 U.S.C. 661 and following) is amended  
11 by adding at the end the following:

12 **“SEC. 321. INVESTMENT IN CERTAIN PASSIVE ENTITIES.**

13 “A licensee may provide financing to a passive busi-  
14 ness as defined at section 107.720(b)(1), Title 13 Code  
15 of Federal Regulations as in effect on January 1, 2009,  
16 which is a corporation or limited liability company wholly-  
17 owned by the licensee and the sole purpose of which is  
18 to provide financing by the licensee to such concerns would  
19 cause investors in the licensee to incur with respect to reg-  
20 ulated investment companies, income not qualifying under  
21 section 851(b)(2)(A) of the Internal Revenue Code of  
22 1986, as amended. Nothing in this section shall affect the  
23 validity of regulations permitting financings of passive  
24 businesses previously duly promulgated by the Adminis-  
25 trator.”.

1 **SEC. 9. INVESTMENT IN SMALLER ENTERPRISES.**

2 Section 303(d) of the Small Business Investment Act  
3 of 1958 (15 U.S.C. 683(d)) is amended by adding at the  
4 end of the following new paragraph:

5 “(3) EXCEPTION.—Notwithstanding paragraphs  
6 (1) and (2), a licensee shall not be required to  
7 achieve any percentage of such financings (at cost)  
8 which is higher than 25 percent which may result  
9 from the application of prior statutory or regulatory  
10 requirements to all or any portion of the licensee’s  
11 portfolio.”.

12 **SEC. 10. CAPITAL IMPAIRMENT.**

13 Section 303(e) of the Small Business Investment Act  
14 of 1958 (15 U.S.C. 683(e)) is amended by adding at the  
15 end the following:

16 “A licensee with Earmarked Assets (as that term is de-  
17 fined by the Administrator) will not be in capital impair-  
18 ment during the first 72 months after its licensee, if its  
19 impairment does not exceed 85 percent”.

20 **SEC. 11. TANGIBLE NET WORTH.**

21 Section 103 of the Small Business Investment Act  
22 of 1958 (15 U.S.C. 662) is amended by striking “and”  
23 at the end of paragraph (18), by striking the period at  
24 the end of paragraph (19) and inserting a semicolon, and  
25 by adding the new paragraph after paragraph (19):

1           “(20) for purposes of the terms ‘small-business  
 2           concern’ in paragraph (5) and ‘smaller enterprise’ in  
 3           paragraph (12) of this section, tangible net worth  
 4           shall, to the extent used, mean the total net worth  
 5           of the small business, in accordance with General  
 6           Accepted Accounting Principles, minus all intangi-  
 7           bles in accordance with General Accepted Account-  
 8           ing Principles.”.

9   **SEC. 12. DEVELOPMENT OF AGENCY RECORD.**

10       Part A of title III of the Small Business Investment  
 11   Act of 1958 is amended by adding the following new sec-  
 12   tion at the end thereof:

13   **“SEC. 322. AGENCY RECORD FOR LICENSING OF SMALL**  
 14                   **BUSINESS INVESTMENT COMPANIES.**

15       “(a) RECORD.—The Associate Administrator for In-  
 16   vestment shall establish an agency record of evidence re-  
 17   ferring or relating to each application for a license to a  
 18   small business investment company.

19       “(b) WRITTEN NOTIFICATION.—The Administrator  
 20   shall provide a written explanation of any denial of a li-  
 21   cense application based upon evidence in the agency record.  
 22   Absent an order by a Federal or State court of general  
 23   jurisdiction, access to applications and the agency record  
 24   shall be limited to the applicant and to the Administrator  
 25   and subordinate personnel of the Administrator.”.

1 **SEC. 13. PROGRAM LEVELS.**

2 Section 20 of the Small Business Act is amended by  
3 inserting the following new subsection after subsection (e):

4 “(f) TITLE III OF THE SMALL BUSINESS INVEST-  
5 MENT COMPANY ACT OF 1958.—

6 “(1) PROGRAM LEVELS 2010.—For fiscal year  
7 2010, in carrying out the program authorized by  
8 Title III of the Small Business Investment Act of  
9 1958, the Administrator is authorized to make—

10 “(A) \$5,000,000,000 in purchases of par-  
11 ticipating securities; and

12 “(B) \$5,000,000,000 in guarantees of de-  
13 bentures.

14 “(2) PROGRAM LEVELS 2011.—For fiscal year  
15 2011, in carrying out the program authorized by  
16 Title III of the Small Business Investment Act of  
17 1958, the Administrator is authorized to make—

18 “(A) \$5,000,000,000 in purchases of par-  
19 ticipating securities; and

20 “(B) \$5,5000,000,000 in guarantees of de-  
21 bentures.”.

○